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No. 04-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

vs.

CITY OF NEW LONDON, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF AMICI CURIAE OF ROBERT NIGEL RICHARDS, CHARLES WILLIAM COUPE, JOAN ELIZABETH COUPE, AND JOAN COUPE SUPPORTING PETITIONERS

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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INTEREST OF AMICI CURIAE

Amici curiae Robert Nigel Richards, Charles William Coupe, Joan Elizabeth Coupe, and Joan Coupe (Richards Family) respectfully submit this brief in accordance with Supreme Court Rule 37.[1] The Richards Family is the owner of private real property situated on the western slope of Hualalai, an active 8,200 foot volcano on the island of Hawaii. Their property is not blighted. Like Petitioners, the Richards Family's property, which has been in their family for generations, has been threatened with the exercise of eminent domain to benefit private developers. In *County of Hawaii v. Robert Nigel Richards, et al.*, Civ. No. 00-1-0181K (Haw. 3d Cir. filed Oct. 9, 2000), the County of Hawaii at the sole discretion of a private developer, is attempting to condemn portions of the Richards Family's property to site a road without which a neighboring Pebble Beach-style project could not be developed. In order to obtain its land use approvals, the developer must construct an access highway from the main road to its project site. The developer chose a route though the Richards Family's property that cleaves their parcel in two.

The County has relinquished to the developer the responsibility of selecting and acquiring the Richards Family's property for its highway.[2] The developer and the

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[1] The parties consented to the filing of amici curiae briefs, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amici curiae and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The developer is not an agency of government or a public utility authorized by law to exercise the power of eminent domain. *See* Haw.

(Continued on following page)

County entered into a development agreement under which, at the demand and sole discretion of the developer, the County must exercise its power of eminent domain to take the Richard Family's property for the developer's highway. The developer, not the County, is required to pay the costs and expenses associated with the condemnation of the property. The Richards Family was not a party to the development agreement, and did not receive personal notice or an opportunity to provide input or comment prior to its execution. The court is currently considering the Richards Family's objections to the taking of their property, including challenges under the public use clauses of the Fifth Amendment and the Hawaii Constitution.

Hawaii property owners understand the impact of harsh application of eminent domain, having lived for more than thirty-five years under the Land Reform Act at issue in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).[3] The Richards Family has borne entirely the cost of preparing this brief, as they believe the issue before the Court is of vital importance to their family and other private property owners nationwide who find themselves on the business end of eminent domain abuse, threatened with having their property taken away for the benefit of another private party who has promised the government that they will make "better" use of it.

Rev. Stat. § 101-4 (2003) (authorizing certain utility companies to condemn private property).

[3] Perhaps sensing that The Land Reform Act's oligopoly-busting public use rationale is no longer applicable and that some exercises of eminent domain have gone "too far," Honolulu has given preliminary approval to repeal its version of the Act. Honolulu Revised Ordinances chapter 38 permits condominium lessees to petition the city to seize their leases from the lessors and turn them over to the lessees upon payment of just compensation. The city council has voted 7-2 to repeal and final approval is pending. *See* Gordon Y.K. Pang, *Council Favor End to Condo Law*, The Honolulu Advertiser (Aug. 12, 2004).

SUMMARY OF ARGUMENT

In undertaking the review of public use issues reserved to the judiciary in *Midkiff*, 467 U.S. at 240, this Court should adopt the same heightened scrutiny for exercises of the eminent domain power justified by promises of a better economy as it has established for suspect regulatory takings: a taking justified only by economic development is invalid if it fails to substantially advance a legitimate state interest. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (regulation is an illegal taking if it "fails to substantially advance a legitimate state interest").

Under the Fifth Amendment's Takings Clause, the affirmative exercise of eminent domain to take private property is valid only if it is for "public use" and just compensation is provided. U.S. Const. amend. V. In regulatory takings jurisprudence, a regulation has the same effect as an exercise of eminent domain when it either fails to substantially advance a legitimate state interest, or deprives an owner of beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). A regulation substantially advances a legitimate state interest when there is a nexus between the regulation and a legitimate aim of government, and the regulation is tailored to achieve its end. *Nollan v. California Coastal Comm'n*, 482 U.S. 825, 834 (1987) (nexus required); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("rough proportionality" between goal and means used to achieve it).

Amici suggest this takings standard is applicable in this case. The "substantially advance" test is a restatement of the public use requirement and should govern affirmative takings as well as regulatory takings. There is no principled distinction between eminent domain and regulatory takings, and this case presents the Court with an opportunity to clarify the public use requirement and hold that unless the government shows that taking the property will substantially further the goal of an improved economy or increased tax revenue, it is invalid under the Public Use Clause.

ARGUMENT

I. UNSHACKLED FROM MEANINGFUL JUDICIAL REVIEW OF PUBLIC USE, TAKINGS JUSTIFIED ONLY BY PROMISES OF "MORE" OR "BETTER" ARE BECOMING MORE COMMONPLACE

Next to the power to prosecute criminals, eminent domain – government's power to confiscate private property against the will of the owner – is perhaps the most formidable power wielded by government against individuals. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (use of eminent domain to take property from one private owner and vest it in another is "despotic"). With eminent domain, completely innocent families can be forced from their homes and established businesses shut down against their will, and the property owners are nearly powerless to prevent it.

Because eminent domain is too easily subject to abuse, the Fifth Amendment and the constitutions of all fifty states permit the government to take private property

only if the owner is justly compensated and only if the property is taken for "public use." *See, e.g.*, U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); Haw. Const. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation.").

The government has wide latitude in defining the public objectives of exercises of eminent domain, but use of the power solely to confiscate one owner's property and turn it over to another is barred. *See Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 310 (legislature has "no authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation."); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("law that takes property from A and gives it to B" is "against all reason and justice.").

This Court has upheld the exercise of eminent domain to remedy what amounted to public nuisances by taking severely blighted property and turning it over to a redeveloper. *Berman v. Parker*, 348 U.S. 26 (1954). Other courts, however, stretched that rationale to take non-blighted property, allowing government to use eminent domain to condemn perfectly good property and vest it in others who promised to make "better" use of it. These takings could not be justified by urban renewal, only a "better" economy. For more than twenty years until recently overruled, the seminal case permitting such "economic development" takings was *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, an entire Detroit neighborhood was condemned for a new plant for General Motors. There was nothing wrong with the neighborhood and it was not

blighted, so the public use advanced was that the sprawling 450+ acre auto plant would pump up the city's declining tax base. The citizens whose 1,400 homes, businesses, and churches stood in the way of this "progress," however, had a different view. Their neighborhood was hardly a slum – it was a vibrant working-class community, and they didn't want to leave. The Michigan Supreme Court, however, permitted the taking. *Poletown* was the first case in which a court upheld the "economic development" rationale, and the case served as the model for other governments around the country when they began flexing their eminent domain muscle.[4]

Not surprisingly, governments facing declining tax revenues, stagnant economies, and strained infrastructure have become more and more aggressive in their use of eminent domain to appease private interests that promise to alleviate these problems, straying from traditional uses to more and more outlandish exercises, such as selling zoning along with eminent domain power. Thus, Costcos were slated to replace churches (non-profits don't pay property taxes and big box retailers emphatically do). *Cottonwood Christian Center v. Cypress Redev. Agency*,

[4] Condemning agencies have also been emboldened by *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). In that case, the Court held that pronouncements of public use by the legislature deserve deference, but reminded that "[t]here is . . . a role for courts to play in reviewing a legislature's judgment of what constitutes a public use," even if it is a narrow one. *Id.* at 240. Even though the Court acknowledged that the question of public use remained a judicial one, many view *Midkiff* as a free pass, mistakenly assuming that virtually any use declared by the condemning agency will be considered public by the courts. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) ("most observers today think the public use limitation is a dead letter").

218 F. Supp. 2d 1203 (C.D. Cal. 2002). In Atlantic City, a casino attempted to evict a widow from her home to build a parking lot for limousines. *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Sup. Ct. Law. Div. 1998). In Las Vegas, a 72-year old homeowner vainly fought attempts to take her home for a parking lot to service off-Strip casinos. *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004). All of these uses were considered "public" by the government. And the actual list of owners like Petitioners and Amici whose properties are targeted and who must turn to the courts for protection is much longer. *See* Dana Berliner, *Public Power, Private Gain – A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Whatever protection the Public Use Clause offers against eminent domain overreaching is in danger of very nearly disappearing altogether.

II. THE RIGHT TO KEEP YOUR HOME IS FUNDAMENTAL AND DESERVES THE HIGHEST PROTECTION

Pervading this case is the undeniable fact that Petitioners are making lawful, non-noxious use of their property, and the only reason it is being targeted for acquisition is that someone else has convinced the condemning agency that they will make *better* use of it and that the public will consequently benefit. However, it is the function of the market, not the government, to make value judgments of lawful private uses of property, and to select among them, particularly when someone's home is involved.

This principle of reasonable use of property is enshrined as one of the great trinity of rights acknowledged in both the Fifth and Fourteenth Amendments, on par with life and liberty. Property and one's home are explicitly protected in the Third, Fourth, Fifth, and Fourteenth Amendments, and impliedly in the penumbra of the First, Second, Ninth, and Tenth Amendments. *See* U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law."); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (right to use property for non-noxious uses is a fundamental "stick" in the property rights bundle).[5]

[5] Highlighting the fundamental nature of private property, even the People's Republic of China is amending its constitution:

> The state has the right to expropriate or collect private property in line with laws in the public interest, but has to compensate owners, under the draft amendment.

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An individual's right of property is not different from other fundamental Constitutional and human rights and deserves utmost protection when threatened. *Lynch v. Household Finance Corp.*, 504 U.S. 538, 552 (1972) ("The dichotomy between personal liberties and property rights is a false one."). Property is "sacrosanct," *Hathcock*, 684 N.W.2d at 769, and an individual has a right "to own property and use it as he pleases." *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003).

The Constitutional acknowledgment and protection of property and the home are founded upon Lockean principles that property rights, as a source of individual liberty, cannot be subject to absolute state control. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (the state cannot simply wipe out property rights by prospective legislation); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (the government cannot defeat property rights and permit a taking simply by declaring that

> Tang said the draft amendment set up a critical rule to curb public power and guarantee private owners compensation if they suffer losses in the public interest.
>
> The proposed amendment is hailed not only by the wealthy elite, but also ordinary citizens who feel they have suffered injustices.
>
> "We are not always so confident in representing private clients as sometimes judges lean towards the public party," said Liu Weiping, a Shanghai-based real estate lawyer, who has represented individuals in cases of illegal demolition of homes by local governments and developers.
>
> "With the constitutional guarantee of private property, local governments and real estate developers won't recklessly level private residences as if it is in the nature of things," he said.

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the property never existed at all); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit*" transform private property into public property). *See also Lucas*, 505 U.S. at 1014 (government's ability to redefine the range of interests included in the ownership of property is limited by the Constitution).

III. TAKINGS ANALYSIS HAS LONG REQUIRED A SUBSTANTIAL NEXUS BETWEEN THE GOVERNMENT'S PROFFERED GOAL AND THE MEANS USED TO ACHIEVE IT

This Court's modern takings jurisprudence since its inception in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), has followed a heightened scrutiny test for actions alleged to be de facto takings of property by inquiring whether an action is "substantially related" to a legitimate public purpose, and even if so, whether the regulation devalues property to such a degree that it is no different than a taking of title by eminent domain. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In *Penn Central*, the Court held that a regulation is an enjoinable taking unless it serves "a substantial public purpose." *Penn Central*, 438 U.S. at 127 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The Court held it is:

> implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if *not reasonably necessary to the effectuation of a substantial public purpose* . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Penn Central, 438 U.S. at 127 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring)).

Subsequent decisions of this Court have confirmed the continuing validity of the "substantial public purpose" standard. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."); *Nollan v. California Coastal Comm'n*, 482 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' "); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests' "); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (same); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (same); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (same).[6]

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[6] In *Chevron USA v. Lingle*, 363 F.3d 846 (9th Cir.), *cert. granted*, 125 S. Ct. 314 (No. 04-163, Oct. 12, 2004), the Court is reviewing the State of Hawaii's challenge to the long-standing "substantially advance" takings standard in a case where the Hawaii Legislature responded to the perceived high price of gasoline by capping the rent oil companies may charge dealers who lease company-owned gas stations. The District Court concluded that the rent control law was a taking because it did not substantially advance the legitimate interest of controlling gas prices since rather than decreasing prices, the legislation would actually have the opposite effect of *raising* them.

Although never explicitly articulated, the two-part regulatory takings standard is plainly based on the text of the Takings Clause, and the "substantially advance" test is a restatement of the public use requirement.[7]

Nollan explained when an action advances a legitimate state interest. The coastal commission had conditioned permission to build a beachfront home on the owner's assent to provide public access across his property. The Court held that before the public could be invited to use private property, the government must demonstrate a legitimate interest in doing so, and that an "essential nexus" exists between the interest and the means used to achieve it. *Nollan*, 482 U.S. at 837. The Court accepted the determination that public views of the beach was a legitimate goal of government, and acknowledged that the agency could have prohibited the building of the house if it blocked such views, or could have allowed the building of the house with conditions designed to protect public views. Thus, the agency could have required the property owner "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836-37. The coastal commission had not done so, however, but conditioned its development approval on the exaction of public access that in no way furthered its stated goal of protecting views.

[7] The test of whether a regulation "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, is based upon the Just Compensation Clause – "nor shall private property be taken . . . without just compensation." The "substantially advance" test is a restatement of the Public Use Clause. The remedies available also track the language of the Takings Clause: compensation for denial of all beneficial use, and invalidation for failure to substantially advance a legitimate state interest.

The "constitutional propriety disappears, however, if the condition substituted for the prohibition *utterly fails to further the end advanced as the justification* for the prohibition." *Id.* at 837 (emphasis added). Lacking a substantial nexus to the legitimate goal, the condition was invalidated. In *Dolan*, the Court further explained:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan, 512 U.S. at 390.[8]

Heightened scrutiny is designed to insure that suspect actions requiring the surrender of property for public use are in fact for public use and not "an out-and-out plan of extortion." *Nollan*, 482 U.S. at 837; *Dolan*, 512 U.S. at 387. Eminent domain supported solely by "Field of Dreams" promises of economic development without some showing that the takings will achieve that result presents the same threat – *see Kelo*, 843 A.2d at 581-82, 602 (Zarella, J., concurring in part and dissenting in part) – that the

[8] The nexus test has thus far been limited to cases in which the government effects a *per se* taking by requiring dedication of property to the public, but the instant case presents a much more egregious example of a *per se* taking, as there is the threat of a total takeover by another of title not simply a government invitation to public trespass. Also, unlike the typical exaction situation, in eminent domain the property owner is not presented a "take it or leave it" deal. An owner facing an eminent domain action has no right to refuse compensation and keep her property.

condemning authority, rather than representing the consent of the governed, has been captured by special interests or has an ulterior motive. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 432 (1983). It also is subject to the danger that it may be more efficient for private parties who desire to acquire another's property to "invest" in eminent domain action through the condemning agency than it is to attempt to purchase the property on the open market. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 52 (1998).[9]

[9] *Midkiff*'s rationale is not readily adaptable to economic development takings because its conclusion that pronouncements of public use are coterminous with the police power is dependent upon the expectation that a property owner subject to eminent domain has sufficient political capital to participate meaningfully in the legislative process, and the courts should not interfere in such areas where representative bodies have more institutional competence to balance questions of public policy. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144 (1938). That assumption is severely undermined, however, in economic development takings where the targeted property owners are often in a class of one and unable to organize with others with similar interests to object because there are no others being targeted. The reality is also that the owners of the types of property generally targeted by economic development takings lack the wherewithal to compete in a survival of the wealthiest contest with well-financed special interests bent on acquisition. *See* Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 302 (2000) (citing Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 436 (1983)). In such cases, no judicial deference is due a condemning authority's determination since "the results of a manipulated political process are no more legitimate than those of the unelected judiciary." Jones, *supra* (citing Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 362-63 (1995)).

This Court has also long recognized that physical takings, regulatory takings, and affirmative exercises of the eminent domain power are not different in kind, especially from the position of the property owner who is either dispossessed of his property, or left with little of value:

> It would be a very curious and unsatisfactory result if in construing [the Takings Clause] it shall be held that if the government refrains from absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

Pumpelly v. Green Bay Co., 80 U.S. 166, 176-78 (1871).

Having the same textual foundation, eminent domain and regulatory takings jurisprudence cannot be consistently separated, particularly from the property owner's perspective since it matters little that in one instance the government is affirmatively confiscating his property, while in the other the confiscation is de facto rather than de jure. *See, e.g., Rukab v. City of Jacksonville*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002) ("We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context. In both cases, property owners are asserting their constitutional rights not to have the government take their property without just compensation.").

Maintaining a less rigorous public use standard for affirmative takings would result in the anomalous situation of the individual whose property is taken by regulation

having both invalidation and just compensation remedies available, while the owner whose property is taken by eminent domain would have only the ability to obtain compensation. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (Takings Clause requires *both* invalidation and just compensation remedies for regulatory takings). As the Richards Family is arguing in its case, the government's choice of illegitimate means to accomplish its goals should not be ignored simply because it may be willing to provide compensation.

IV. TAKINGS SUPPORTED ONLY BY "ECONOMIC DEVELOPMENT" MERIT HEIGHTENED JUDICIAL SCRUTINY

Amici suggest this Court adopt a heightened standard of review for exercises of the eminent domain power supported only by promises of "economic development." Such takings are invalid under the Public Use Clause unless the condemning agency shows the taking substantially advances a legitimate state interest and the requisite proportional nexus. The dissenting Justice in the court below recognized a similar standard. After acknowledging that betterment of the economy is a valid goal, he noted:

> In my view, the development plan as a whole cannot be considered apart from the condemnations because *the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement*. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized. The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met.

Kelo, 843 A.2d at 597 (Zarella, J., concurring in part and dissenting in part) (emphasis added).

The question of public use has always been a judicial one, *Midkiff*, 467 U.S. at 240, and heightened scrutiny will not result in unwarranted judicial usurpation of a legislative function. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact"). Instead, heightened review will be useful to "smoke out" illegitimate criteria when the condemning authority is using the "suspect tool" of eminent domain supported only by promises of economic development. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Heightened scrutiny will also not disturb established public use doctrine nor will it initiate a deluge of public use challenges to ordinary eminent domain actions. For example, the takings in *Berman* and *Midkiff* would manifestly satisfy this test. In *Berman*, the taking was designed to improve severely blighted property in Washington, D.C. *Berman*, 348 U.S. at 30. In *Midkiff*, the Hawaii Land Reform Act was enacted to remedy the ills perceived to be caused by concentrated land ownership. *Midkiff*, 467 U.S. at 232-33, 241-42. Eliminating blight and the breakup of land oligopolies are legitimate government goals, and using eminent domain was clearly directed in those cases to accomplish those goals. The property taken was the

property causing the problem: taking blighted property and putting in into the hands of a redeveloper alleviates the blight; exercising eminent domain and vesting individual owners with title diversifies ownership.

Improving the economy is a legitimate goal of government. But when the condemning authority need merely set forth tenuous "butterfly effect"[10] connections between that legitimate goal and the means used to achieve it, no substantive limits remain in the public use requirement. To avoid this, the targeted property owner must be allowed the opportunity to challenge the government's assertion that the exercise of eminent domain to take their property will further that goal, and the condemning authority must demonstrate the nexus between the taking and the betterment of the economy before an individual is casually deprived of her property and home.

If all that is required of the government in economic development takings is to invoke grandiose promises of a "better economy," with no examination of whether there is any substance to that assertion, there is no limit to the government's ability to take property and put it into the hands of another, for more economically intensive uses of any property can always be imagined.

And how often do the promises of a "better economy" materialize? If the subsequent history of *Poletown* is any example, not always:

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[10] *See* James Gleick, Chaos: Making a New Science 8 (1987) (discussing the parable of the flapping of a butterfly's wings that creates a minor air current in China, that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean).

> condemnations that transfer property to private businesses usually don't even provide the economic benefits their advocates promise. General Motors and Detroit Mayor Coleman Young promised that the new factory would create more than 6,000 jobs. In reality, the plant employed less than half that many workers; possibly, more jobs were lost from the destruction of Poletown than were created by the factory. This result is typical.

Ilya Somin, *Poletown Decision Did Not Create Desired Benefits; New Ruling Protects Weak from Government Abuses*, The Detroit News (Aug. 8, 2004). Courts are understandably reluctant to examine closely an agency's predictive ability, but property owners should have the opportunity to challenge such pronouncements when their homes and fundamental property rights are threatened.

Cursory judicial review of economic development takings augurs a return to outdated republican norms that presumed that "takings that advanced the interests of one citizen could be regarded as advancing the interests of all." Nathan A. Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L. J. 339, 380 (1999). These notions have been superceded by the more pragmatic realization that all people – even legislators – are subject to acting in their own self-interest. *See* The Federalist No. 10 (J. Madison) <http://www.yale.edu/lawweb/avalon/federal/fed10.htm>. The danger of total judicial deference to public use pronouncements is plain: without it, condemning authorities would have no reason to refrain from taking private property and turning it over to those who claim that they would make "better" use of it. The public use requirement is supposed to insure that takings are in fact for the public good and not for private gain, and Amici suggest the Court should undertake

careful review of bare assertions of public use in economic development takings. When the government has the ability to take private property from one owner and put it into the hands of another, with the only justification necessary that the economy *may* be benefitted by the transfer of property because the new owner *might* make "better" use of it, the public use requirement has lost all meaning.

The lower courts are beginning to pay attention to the abuse of eminent domain and are reviewing economic development takings against the individual right of property, but have not established a consistent standard of review. *See, e.g., 99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (government "appeased" big box retailer by condemning a smaller competitor); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (Costco versus a church); *Bailey v. Superior Court*, 76 P.3d 898 (Ariz. Ct. App. 2003) (attempt to take a non-blighted automobile repair shop and turn over the property to a neighboring hardware store for expansion); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown*, economic development takings do not satisfy public use requirement); *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (economic development taking invalid); *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (same).

While state courts are free to set their own high standards under their state public use requirements, in the absence of definitive guidance from this Court establishing minimum standards, property owners like Petitioners and Amici will continue to live in the crosshairs.

See Hathcock, 684 N.W.2d at 786 ("*Poletown*'s economic benefit rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity.") (emphasis original).

The standard for economic development takings adopted by the court below ignores the separate purposes served by the Public Use Clause and the Just Compensation Clause. The purpose of the public use requirement is to insure that the private property owner is not being unfairly forced to contribute his or her property to someone else's private use and that the government's purported use of the property is real before an individual's fundamental rights are interfered with.

The purpose of the Just Compensation requirement is to insure that the cost of public benefits are not concentrated in a few but spread across the beneficiaries, and that an owner whose property is targeted for public use is at least provided fair market value as a result of the forced sale. *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) ("since the acquisition was for public use . . . [t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Both parts of the Takings Clause should be acknowledged.

CONCLUSION

If the public use requirement is to continue to have significance, then a condemning authority's conclusory assertions that taking private property and vesting it in

another will boost the economy does not satisfy the Takings Clause. The Constitution requires public use, not just "better" use. Affirming the Connecticut Supreme Court's decision in this case would write out of the Constitution the last measure of protection property owners have to keep their homes and defend their "sacrosanct right" of property.

Property owners who bear the burden of these experiments in Darwinian economics may be able to obtain monetary compensation, but the intangible loss of home, neighborhood, and community is never "just." The only check on eminent domain abuse is the public use requirement, an agency's ability to self-police, and meaningful judicial review when it fails to do so. Although compensation may be provided for illegitimate exercises of eminent domain for purely private uses, receiving money is bitter justice if the government is forcibly evicting the owner from the family homestead or a life's work, for the enrichment of another.

In the end this case is reduced to this vital fact: the Constitution contains the *Takings* Clause, not just the Just Compensation Clause.

Respectfully submitted,

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